



In the Matter of:

WILLIAM T. KNOX,

ARB CASE NO. 03-040

COMPLAINANT,

ALJ CASE NO. 01-CAA-3

v.

DATE: September 30, 2004

UNITED STATES DEPARTMENT OF THE INTERIOR,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Daniel P. Meyer, Esq., *Public Employees for Environmental Responsibility, Washington, D.C.*, and Richard E. Condit, Esq., *Washington, D.C.*

For the Respondent:

Donald S. Harris, Esq., *U.S. Department of the Interior, Washington, D.C.*

FINAL DECISION AND ORDER

William T. Knox filed a whistleblower complaint against his employer, the United States Department of the Interior (DOI), claiming that it violated the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 1995); the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); and the Department of Labor's (DOL) implementing regulations set out at 29 C.F.R. Part 24 (2004). To prevail on his CAA complaint, Knox must establish by a preponderance of the evidence that, when he expressed concerns or complaints to DOI management officials about asbestos, he had a reasonable belief that DOI was violating the CAA by emitting asbestos into the air outside of its buildings. Knox expressed his concerns to DOI management that employees, students, and contractors at a National Park Service Job Corps Center were exposed to asbestos. But because he did not bring to management's attention that asbestos was being emitted into the outside, ambient air,

Knox did not engage in CAA-protected activity. Therefore, we dismiss Knox's CAA complaint.¹

BACKGROUND

Knox began working as a Training Instructor at the National Park Service Job Corps Center in Harper's Ferry, West Virginia on November 21, 1999. Respondent's Exhibit (RX) 46. Part of Knox's duties included acting as the safety officer for the Center. RX 45. While accompanying a United States Department of Labor Occupational Safety and Health Administration (OSHA) officer during a regularly scheduled safety inspection of the Center's facilities in December 1999, Knox learned that some of the Center's buildings contained asbestos. RX 2. Knox also found an "Asbestos Survey Report" dated September 8, 1993, and an OSHA "Notice of Unsafe or Unhealthful Conditions," issued after a previous inspection in January 1999. *Id.* Both noted the presence of asbestos in buildings at the Center.

In January 2000 Knox told DOI management officials that the Job Corps Center had an asbestos problem. He said that employees, students, and contractors at the Center may have been exposed to hazardous asbestos in the workplace and that they should be informed of their potential exposure. *See* Complainant's Exhibits (CX) 118-119; RX 45, 55. Knox testified that at a meeting on January 11, 2000, at which he discussed his asbestos concerns, management threatened to reduce his job duties and pay. Hearing Transcript (HT) at 1319-1320, 2133.

This threat led Knox to file the first of three whistleblower actions with the Merit Systems Protection Board (MSPB), in which he contended that he was exposed to asbestos and was working in unsafe and unhealthful conditions. RX 54-55. Knox then wrote a letter to the DOI Office of Special Counsel on February 2, 2000, again expressing his concern that employees, students, and contractors had been exposed to asbestos at the Job Corps Center. CX 120; RX 55. Knox also faxed a letter to DOI Secretary Bruce Babbitt on March 7, 2000, contending that DOI managers had harassed and discriminated against him because he had revealed the asbestos problems at the Job Corps Center. Administrative Law Judge Exhibit (ALJX) 1.

Then, on March 13, 2000, Jay Weisz, the Center's director, fired Knox. Weisz believed Knox was a probationary employee whose employment could be terminated at will. RX 31. Upon discovering that Knox was actually a permanent employee, DOI reinstated Knox on March 18, 2000, and removed all reference to his firing from his record. RX 48.

¹ The ALJ correctly held that sovereign immunity bars Knox's TSCA complaint. *R. D. & O.* at 20, 32, 43-44. *See Johnson v. Oak Ridge Operations Office, United States Dep't of Energy*, ARB No. 97-057, ALJ Nos. 95- CAA-20, 21, and 22, slip. op. at 9- 10 (ARB Sept. 30, 1999); *Stephenson v. NASA*, 1994-TSC- 5 (Sec'y July 3, 1995).

Knox filed this whistleblower action in April 2000, alleging violations of the CAA and TSCA whistleblower protections. *See* ALJX 3. As required by regulation, OSHA investigated the allegations and found them to be valid. DOI then requested a hearing with the Office of Administrative Law Judges. *Id.* *See* 29 C. F. R. § 24.4. A United States Department of Labor Administrative Law Judge (ALJ) conducted a hearing and issued a Recommended Decision and Order (R. D. & O.) on December 30, 2002. The ALJ concluded that DOI had violated the CAA. Thus, the ALJ ordered reinstatement, back pay, compensatory and exemplary damages. He also prohibited DOI from further retaliation and ordered it to clear Knox's record and publicly post the order. DOI filed this appeal.

JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes, such as the CAA, authorize the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The Secretary has delegated authority for review of an ALJ's initial decisions to the ARB. 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

DISCUSSION

The Legal Standard

The CAA prohibits employers from retaliating when their employees engage in so-called "protected activities":

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or

enforcement of any requirement imposed under this chapter or under any applicable implementation plan . . . [or,]

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C.A. § 7622(a) (1), (3). *See also* 29 C.F.R. §§ 24.2(a), 24.3(a), 24.4(d) (3).

To prevail here, Knox must establish by a preponderance of the evidence that he engaged in protected activity of which DOI was aware, that he suffered adverse employment action, and that the protected activity was the reason for the adverse action. *Seetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. at 5 (ARB May 28, 2004).

To establish that he engaged in CAA protected activity, Knox must prove that when he expressed his concerns about the asbestos to DOI managers, the DOI Office of Special Counsel, and Secretary Babbitt, he reasonably believed that DOI was emitting asbestos into the ambient air. *See Kemp v. Volunteers of America of Pa., Inc.*, ARB No. 00-069, ALJ No. 00-CAA-6, slip op. at 4, 6 (ARB Dec. 18, 2000). “Ambient air” is “that portion of the atmosphere, external to buildings, to which the general public has access.” 40 C.F.R. § 50.1(e) (2004). To be protected, safety and health complaints must be related to requirements of the environmental laws or regulations implementing those laws; the employee protection provisions protect employees from retaliation only if they have reported safety and health concerns addressed by those statutes. *Mourfield v. Frederick Plass & Plass, Inc.*, ARB Nos. 00-055, 00-056, ALJ No. 99-CAA-13, slip op. at 8 (ARB Dec. 6, 2002).

Here we emphasize a distinction. Generally, regulations issued under the Occupational Safety and Health Act (OSH Act) govern exposure to asbestos in the workplace. *See* 29 U.S.C.A. § 651 *et seq.* (West 1999). *See also* 29 C.F.R. § 1910.1001 (2003). The purpose of the OSH Act is to encourage employees to come forward with complaints about safety and health hazards at their worksites so that remedial action may be taken to achieve safe and healthful working conditions. But employee concerns or complaints about purely occupational worksite hazards are not protected under the CAA’s employee protection provision. *See Aurich v. Consolidated Edison Co. of N.Y.*, 86-CAA-2, slip op. at 4 (Sec’y Apr. 23, 1987) (“Any complaints regarding effects on public safety or health, or concerning compliance with EPA regulations, under the CAA, are protected under the CAA, but those related only to occupational safety and health are not.”). The purpose of the CAA is to protect the general public’s health by preventing pollutants from fouling the ambient air. 42 U.S.C.A. § 7401(b) (1). *See also Natural Res. Def. Council, Inc. v. EPA*, 725 F.2d 761, 764 (D.C. Cir. 1984). The CAA governs the general public’s exposure to hazardous pollutants, like asbestos, that are emitted from workplace buildings into the outside, ambient air. *Stephenson v. NASA*, ARB No. 98-025, ALJ No. 94-TSC-5, slip op. at 15 (ARB July 18, 2000). The OSH Act and the CAA both prohibit employers from discriminating against employees who engage in protected

activity. *See* 29 U.S.C.A. § 660(a); 42 U.S.C.A. § 7622. The Secretary of Labor has delegated final decision making authority in whistleblower actions under the CAA to this Board, but we have no comparable authority under the OSH Act.

The ALJ's Findings and the Parties' Contentions

The ALJ found that Knox was concerned that asbestos was present at the Job Corps Center and that such asbestos posed a hazard to the staff and workers, to visitors, and to the general public. R. D. & O. at 17, 34. Thus, because he found that the general public was affected, the ALJ held that Knox engaged in protected activity under the CAA. R. D. & O. at 45, 49.

DOI argues that Knox failed to prove that his complaints to DOI management officials pertained to the outside, ambient air and, therefore, do not fall under the CAA employee protections. Respondent's Brief at 16-20.² Knox argues that his concerns that employees, students, and contractors might be exposed to asbestos is sufficient to establish protected activity under the CAA and that, therefore, the record supports the ALJ's findings that he engaged in activities protected under the CAA. *See* Complainant's Response Brief at 24. Therefore, we will examine what Knox told DOI management about the asbestos and whether it is CAA-protected activity.

Knox's Communications With DOI About the Asbestos

When he found out about the asbestos in the Job Corps Center buildings in December 1999, Knox initially expressed his concerns to his supervisor, Valerie Flemming. RX 2. Knox testified that he told Flemming that there was "an asbestos problem" at the Center. HT at 1279; ALJX 1; RX 55. Flemming testified that Knox was concerned that personnel at the Center were not aware of the asbestos. HT at 75. But Flemming also testified that Knox never told her he was worried about the asbestos escaping into the outside air. HT at 4419.

Knox then sent a fax to Gloria Brown, the Regional Safety Officer at DOI. CX 119. Knox referenced the 1993 "Asbestos Survey Report" and the January 1999 OSHA "Notice of Unsafe or Unhealthful Conditions" as indicating the presence of asbestos in buildings at the Center. Knox requested assurance that "existing asbestos hazards in the work place" would be identified. *Id.* But, again, Knox did not relate any concern about asbestos leaving the buildings at the Center.

On January 6, 2000, Knox and DOI management officials, including Flemming and Brown, met at DOI headquarters in Washington, D.C. Knox testified that he explained to the management officials "what the asbestos problem was, who was exposed and that no one was ever told about the asbestos problem at the Center." HT at 1290; ALJX 1; RX 55. As a result of this meeting, Brown and Gentry Davis, DOI Deputy

² Because Knox did not meet his burden to establish that he engaged in CAA-protected activity, we need not address DOI's other arguments.

Regional Director for safety, met with Knox at the Job Corps Center and inspected the facilities for asbestos. ALJX 1. Both Brown and Davis testified that Knox did not indicate to them any concern that asbestos at the Center's facilities may have been getting into the outside, ambient air. HT at 2749; 4194. Knox later met with Flemming and Jay Weisz, the Center's director. Knox testified that he told Flemming and Weisz that he felt that employees of the Center "were in a dangerous working environment." ALJX 1; RX 55. Weisz testified that Knox told him that he believed that employees at the Center had been exposed to asbestos. HT at 180. But, like Flemming, Weisz also testified that Knox did not indicate that the asbestos endangered the outside air. HT at 204, 231. *See also* HT at 4419.

Finally, neither Knox's MSPB filing nor his letter to the DOI Office of Special Counsel expresses concerns about asbestos escaping into the ambient air. RX 54-55; CX 120. And his fax to Secretary Babbitt claiming that he had been harassed and discriminated against refers only to the "asbestos problems found at the Center." ALJX 1.

The foregoing evidence indicates that Knox was not concerned that DOI was emitting asbestos into the ambient air. Moreover, in his March 21, 2001 testimony, Knox admits that he did not raise a concern with DOI management officials about asbestos escaping from DOI's Job Corps Center buildings. HT at 2597, 2605. And though the ALJ credited Knox's testimony because of his demeanor, whether Knox engaged in protected activity does not turn on his credibility because of this admission that he did not engage in CAA-protected activity.

On the other hand, we are quick to point out that Knox testified that he observed asbestos escaping into the outside, ambient air via an exhaust fan in the maintenance shop of the Job Corps Center.³ But Knox's burden is to prove that when he actually expressed concerns about asbestos to DOI management officials, he reasonably believed that asbestos was escaping into the air outside the Center's buildings, thereby posing a risk to the general public. We have no evidence that Knox ever told DOI officials about the exhaust fan. Consequently, testimony merely that he observed asbestos escaping through the exhaust fan does not establish that Knox's activities are protected under the CAA. *See Kemp*, slip op. at 4.

Finally, Knox claims that he "articulated concern [to management] about the general public being endangered by emissions of asbestos fibers." CX 100. We give no weight to this self-serving, contradictory statement contained in an affidavit dated May

³ *See* HT at 1273, 1276, 1354, 1454, 1507-1508, 1970, 2041-2042, 2069, 2102, 2160-2161, 2420, 2550, 2574, 2581, 2590, 2592, 2596, 2598, 2600, 2603.

14, 2001, because, as we have noted, almost two months earlier, on March 21, 2001, Knox admitted that he had not told management about asbestos in the outside air.⁴

CONCLUSION

To succeed on his whistleblower claim, Knox must demonstrate by a preponderance of the evidence that he engaged in CAA-protected activity. Knox had to prove that when he told DOI management about the asbestos, he reasonably believed that asbestos was emitted into the ambient air. Knox did not carry this burden of proof. Therefore, we **DISMISS** this complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

⁴ We do not decide whether Knox submitted the affidavit in accordance with the ALJ's instructions. *See* HT at 4660-4661. Nor do we decide whether the ALJ made the affidavit part of this record.